REVISIONAL CRIMINAL.

1908
March 16.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

EMPEROR *v.* SERH MAL.*

Criminal Procedure Code, sections 195, 439—*Sanction to prosecute—Revision—Powers of High Court.*

An application under section 195 of the Code of Criminal Procedure for sanction to prosecute was made to and granted by a Magistrate of the first class. A further application under section 195 of the Code to revoke the sanction was made to the Sessions Judge, but was rejected. *Held* that the High Court had power to send for the record of the case under section 435 and to interfere, if necessary, under section 439 of the Code of Criminal Procedure with these orders. *Kusal* v. *Badri Prasad* (1) overruled. *Muthuswami Mudali* v. *Veeni Chetti* (2) referred to.

In this case a Magistrate of the first class in the Banda district, on the application of one Bhairon Prasad, granted sanction for the prosecution of the applicant Serh Mal for an offence punishable under section 211 of the Indian Penal Code. Serh Mal applied to the Sessions Judge of Banda to revoke this sanction. The Sessions Judge declined to interfere. Serh Mal then applied to the High Court in revision, and the record was sent for under the provisions of section 435 of the Code of Criminal Procedure.

A preliminary objection was taken on the strength of the ruling in *Kusal* v. *Badri Prasad* (1) that the High Court had under the circumstances of the case no jurisdiction to interfere with the orders of the Courts below, even under section 439 of the Code of Criminal Procedure.

Mr. *C. C. Dillon* and Babu *Satya Chandra Mukerji*, for the applicant.

Babu *Durga Charan Banerji*, for the opposite party.

AIKMAN and KARAMAT HUSEIN, JJ.—A Magistrate of the first class in the Banda district on the application of one Bhairon Prasad granted sanction for the prosecution of the applicant Serh Mal for an offence punishable under section 211 of the Indian Penal Code. Serh Mal applied to the learned Sessions

* Criminal Revision No. 71 of 1908, from an order of J. L. Johnston, Sessions Judge of Banda, dated the 9th of December 1907, confirming an order of Gada Husain, first class Magistrate of Karwi, dated the 2nd of September 1907.

(1) Weekly Notes, 1907, p. 283. (2) (1907) I. L. R., 30 Mad., 382.

1908

EMPEROR v. SERH MAL.

Judge to revoke this sanction. The learned Judge declined to interfere. Serh Mal then applied to this Court in revision, and the record was sent for under the provisions of section 435 of the Code of Criminal Procedure.

The first question we have to consider is whether this Court can interfere in revision. We have been referred to a decision of a learned Judge of this Court in *Kusal* v. *Badri Prasad* (1). With the opening part of that judgment we are in full agreement If section 195 stood alone in the Code, we are of opinion that this Court would have no right to interfere in the case. With all deference to the learned Judges who decided the case *Muthuswami Mudali* v. *Veeni Chetti* (2), we are unable to hold that when a Sessions Judge refuses to interfere with a sanction granted by a Magistrate under section 195 of the Code of Criminal Procedure this refusal to interfere is equivalent to the giving of a sanction for the purposes of the section. We agree with what was said by Wallis, J., in the referring order in that case But in the case of *Kusal* v. *Badri Prasad*, the learned Judge went on to hold that in a case like the present this Court has no power of interference even under section 439 of the Code. With the utmost respect for the learned Judge this is a view which we are not prepared to adopt. It is a view, which, so far as we know, has not been taken either by this Court or by any other Court. We have been referred to an unreported case, Criminal Revision No. 612 of 1907, which is similar to the present case. In that case the application for revision was admitted by the same learned Judge who decided the case of *Kusal* v. *Badri Prasad* and was ultimately granted by another learned Judge of this Court. There can be no doubt that section 435 gives this Court power to call for and examine the record of a proceeding such as in this case was before the Courts below, and that power is given in order that this Court may satisfy itself of the correctness, legality or propriety of any order passed in the case. We do not think it could have been the intention of the Legislature that when a High Court under the powers conferred on it by section 435 calls for the record of a proceeding, it can only express an academic opinion as to the legality or propriety of the

(1) Weekly Notes, 1907, p. 283. (2) (1907) I. L. R., 30 Mad., 382.

order and cannot give effect to its opinion. Section 439, sub-section (1), provides that when the High Court has called up a case like the present, it may in its discretion exercise any of the powers conferred on a Court of appeal by section 195 of the Code. We are of opinion that this Court is thereby vested with the power to deal with the order of the Magistrate in the same way as the Sessions Judge might have dealt with it under section 195, clause (6). We hold therefore that there is no bar to our dealing with the case in revision.

Coming to the merits of the case we are of opinion that the order sanctioning the prosecution of the applicant for an offence under section 211 of the Indian Penal Code cannot be maintained. The order itself is defective inasmuch as it does not specify the Court or other place in which, and the occasion on which, the offence was committed. We should not have been inclined to interfere solely on the ground of this omission, but the learned advocate for the opposite party is unable to refer us to anything upon the record which in the slightest way supports the idea that Serh Mal committed an offence under section 211 of the Indian Penal Code. The learned advocate for the opposite party asks us to treat the case as if it were a sanction given for the prosecution of the applicant for the abetment of an offence under section 211. This we decline to do. But in order to save the applicant from further proceedings we feel bound to state that we are unable to discover on the record any materials sufficient to justify the prosecution of the applicant for the offence of abetment. We allow the application and revoke the sanction given by the Magistrate on the 2nd of September 1907 for the prosecution of Serh Mal for an offence under section 211 of the Indian Penal Code.